IN THE HIGH COURT OF JUDICATURE AT BOMBAY:

NAGPUR BENCH: NAGPUR

CRIMINAL APPLICATION NO. 1494 OF 2006

Govind Shankarlal Bajaj,
Age : years, Occupation : Business,
Manager, New Jain Patra Depot,
Having its office at Nagpuri Jin,
Akola. ...**APPLICANT**

...VERSUS...

1. Ashok
   Proprietor Vjiay Traders
   C/o. Prashant Hardware,
   At post Medshi, Talukar Malegaon,
   District : Washim.

2. State of Maharashtra, through Police Station,
   City Kotwali, Akola **...RESPONDENTS**

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Shri S.S.Joshi, Advocate, for the applicant.
Shri J.B.Kasat, Advocate, for Respondent No. 1.
Shri N.S.Khubalkar, A.P.P. for Respondent No. 2 State

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CORAM:- S. R. DONGAONKAR, J.
RESERVED FOR ORDER ON : 16.O8.2007
ORDER PRONOUNCED ON : 22.08.2007

O R D E R

1. Heard Mr. S.S.Joshi, Advocate, for the applicant, Mr. J.B.Kasat, Advocate, for Respondent No. 1 and Mr. N.S.Khubalkar, A.P.P. for Respondent No. 2 State.

2. This application is filed by the applicant under Section 482 of the Criminal Procedure Code, seeking quashing of the order passed by Learned Chief Judicial Magistrate, Akola, in S.C.C. No. 3664/04, dated 3.3.2005, by which he observed that the complainant and his counsel Shri Sangani remained absent till 5.00 p.m. when the matter was called and dismissed the said case. The order was maintained in Criminal Revision Application No. 60/2005, decided by 2nd Ad-hoc Additional Sessions Judge, Akola, on 15.12.2005. As such the instant application.

3. It may be stated that applicant has filed a complaint under Section 138 of Negotiable Instrument Act, before the Chief Judicial Magistrate, Akola. During the course of the proceedings, on 3.3.2005, the complainant and his counsel remained absent when the matter was called till 5 p.m. The case was dismissed under Section 256 of Cr.P.C. for

non-appearance of the complainant and for want of adducing evidence. It was noticed that the accused was present in the Court with his counsel. This order dated 3.3.2005 was challenged by the complainant in Criminal Revision Application No. 60/2005 before 2nd Ad-hoc Additional Sessions Judge, Akola. The said revision application was dismissed after hearing the parties. The learned 2nd Ad-hoc Additional Sessions Judge, Akola, held that the said revision application was not maintainable in view of the circumstances of the case.

4. This order is challenged by the applicant in the present application.

5. Learned counsel Mr. S.S.Joshi, for the applicant, has submitted that the matter was not fixed for evidence on 3.3.2005. According to him, the learned trial Judge has passed an incorrect order under Section 256 of Cr.P.C. He submitted that the learned Ad-hoc Additional Sessions Judge, has dismissed the revision application by taking wrong view of the matter. Relying on **AIR 1998 SC 596 [Associated Cement Co. Ltd., vs. Keshvanand] & 2002 Cri.L.J. 4465 [Priyadarshini Cements Limited and etc., vs. State of A.P. and another etc.]** he contended that the learned Magistrate should have adjourned the matter in the circumstances of the case instead of proceeding

under Section 256 of Cr.P.C. to acquit the accused. According to him, the said matter was transferred to that Court on that day and therefore, it was thought that the matter may not be taken on that day. Further, he has taken me through the memo of revision application to contend that the learned counsel for the applicant/complainant was present in the Court through out the day when the matter was dismissed and in fact he had appeared in 6-7 cases personally. Therefore, according to him, the said order of the learned trial Judge was incorrect and it was obtained by the respondent/accused tactfully. It is, therefore, his contention that in the interest of justice the said order should be set aside.

6. Learned counsel Mr. J.B.Kasat, for Respondent No. 1 has submitted that even earlier, when the case was fixed for evidence on many dates, the complainant was absent and therefore, the order passed by the learned trial Court is correct. It is also his submission that it is not the appearance of the counsel for the applicant but the absence of the complainant that matters under Section 256 of Cr.P.C. In fact, the complainant did not lead any evidence on the earlier dates when the matter was fixed for evidence and therefore, the order of the learned trial Judge is correct,

so also the order of the learned Additional Sessions Judge, dated 15.12.2005 to confirm the same.

7. In order to appreciate the controversy in the matter, it is necessary to closely peruse the Roznama of the complaint case. It appears that on 8.7.2003 the particulars of offence were explained and the accused had pleaded not guilty and the matter was fixed for evidence on 25.8.2003. Further order sheets dated 25.8.2003, 11.9.2003, 13.10.2003, 15.11.2003, 21.11.2003, 2.12.2003, 3.1.2004, 28.1.2004, 18.2.2004, 23.6.2004, 31.7.2004, 26.8.2004, 30.9.2004, 31.10.2004, 25.11.2004, 29.12.2004, 28.1.2005 & 3.3.2005 show that the matter was fixed earlier for evidence and later for consideration of the application filed by the accused for dismissal of the complaint. The prayer in the relevant application (Exh.11) is thus--

> *Prayer – Application be kindly allowed and complaint be kindly dismissed and accused be discharged in the interest of justice.*

It was alleged in the said application that the complainant in the above matter is absent since long though the matter is fixed for evidence and there was harassment to the accused, so the complaint should be dismissed.

8. The order-sheet dated 3.3.2005 reads thus--

3.3.05 *Case received from the 4th Court.*
Complainant absent.
Counsel for complainant absent.
Accused counsel present--
Case dismissed *sd/-*
CJM

It clearly appears that the matter was received by the Court of C.J.M. from the 4th Court and on that day, complainant was absent. Earlier the matter seems to have been fixed for order on Exh. 11. Therefore, it does appear that the matter was not fixed for evidence of the complainant on 3.3.2005.

9. It also appears from the earlier Roznama that both the parties were represented by their counsel on same dates, meaning thereby that the parties i.e. the complainant and the accused were absent. Thus, it emerges that on 3.3.2005 there was no reason for the complainant to be conscious of the fact that the matter was fixed for evidence.

10. In such circumstances, the order dated 3.3.2005, which is passed by the learned trial Judge on the basis of absence of complainant and his non taking steps to lead evidence appears to be unjust. In my opinion, the appropriate and just order would have been, to adjourn the

matter by granting last chance to the complainant to lead evidence.

11. Further it is evident that, the counsel for the complainant has filed his own pursis on 4.3.2005 to state that he was present for all the day. In fact he has made such assertion in the revision application. I need not go into the consequence of the same, but suffice it to say that it was obligatory for the complainant to remain present, unless there was specific exemption from appearance, inasmuch as the very application that was fixed for orders, was for dismissing the complaint and acquitting the accused, for the absence of the complainant & non leading of evidence.

12. However, taking the over all view of the matter and the principles laid down by the Apex Court in **AIR 1998 SC 596 Associated Cement Co.'s case**, I find it expedient, to secure the ends of justice, to remit the matter back to the learned trial Judge by setting aside the impugned order & acquittal of the respondent accused, with a direction to fix the matter for recording evidence with due notice to the parties, and to proceed according to law.

13. Hence, this application is partly allowed. The order of the learned trial Judge dated 3.3.2005 and the order in Revision application dated 15.12.2005 are hereby set aside. The matter is remanded back to the learned Chief Judicial Magistrate, Akola, with a direction to grant opportunity to the complainant to lead evidence, on a date fixed, and then to proceed according to law to decide the matter afresh.

The learned trial Judge will be at liberty to pass appropriate orders, if the complainant remains absent or he does not adduce evidence on the date fixed.

Ordered accordingly.

JUDGE

Rvjalit